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## PRESUMPTIONS AND BURDENS OF PROOF IN LOUISIANA PROPERTY LAW

*Lee Hargrave\**

One ventures the assertion that "presumption" is the slipperiest member of the family of legal terms, except its first cousin, "burden of proof."

McCormick on Evidence<sup>1</sup>

The recent recodification of Louisiana property law contains several presumptions and burdens of proof. For example:

—"Buildings, other constructions permanently attached to the ground, standing timber, and unharvested crops or ungathered fruits of trees . . . are presumed to belong to the owner of the ground, unless separate ownership is evidenced by an instrument filed for registry . . ." Louisiana Civil Code article 491.

—"The possessor of a corporeal movable is presumed to be its owner. The previous possessor of a corporeal movable is presumed to have been its owner during the period of his possession. These presumptions do not avail against a previous possessor who was dispossessed as a result of loss or theft." Article 530.

—"One who claims the ownership of an immovable against another in possession must prove that he has acquired ownership from a previous owner or by acquisitive prescription. If neither party is in possession, he need only prove a better title." Article 531.

—"When the titles of the parties are traced to a common author, he is presumed to be the previous owner." Article 532.

—"One is presumed to intend to possess as owner unless he began to possess in the name and for another." Article 3427.

—"Good faith is presumed." Article 3481.

Because these and other related provisions use the term presumption in a number of different senses, an understanding of the law in this area must go beyond an abstract discussion of presumptions and into the details of the property institutions involved. Though one author has

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1. McCormick, Handbook of the Law of Evidence § 342 (E. Cleary 3d ed. 1984).

suggested the term presumption is used in at least eight different senses,<sup>2</sup> a simpler listing will suffice here. *Conclusive presumptions* are not presumptions at all, but are rules of substantive law that cannot be controverted. The oft-stated presumption that a child under the age of seven does not have the discernment to commit a felony is simply expressing the substantive rule that a child under seven cannot be convicted of a crime.<sup>3</sup> *Matters of inference* are not true presumptions either. One may, for example, speak of a presumption that a person intends the consequences of his acts, but this is more properly an inference ("circumstances indicate")<sup>4</sup> that one intended the result based on common experience ("in the ordinary course of human experience").<sup>5</sup> A *true presumption* is rebuttable; the law attaches to a known fact the consequence of establishing another unknown fact. Some authorities suggest that a true presumption shifts the burden of persuasion in civil cases; others suggest it simply shifts the burden of coming forward with the evidence.<sup>6</sup> Part of the difficulty with presumptions in Louisiana is that the English word presumption is hard to dissociate from the Anglo-American jury trial procedure which uses presumptions in establishing burdens of proof and directing juries composed of persons who are not legally trained. Much of Louisiana's property law, however, is derived from Continental sources which use presumptions as substantive rules to guide legal experts. Though Continental property law distinguishes between simple presumptions and conclusive presumptions,<sup>7</sup>

French law and doctrine make no sharp distinction between the burden of going forward—that is, the burden of producing sufficient evidence to permit the court to find in favor of the proponent of the evidence—and the burden of persuasion, that is, the burden of actually persuading the court to find in favor of the proponent of the evidence.<sup>8</sup>

The focal point of this article is that clarity and simplicity will be advanced if problems related to proof of ownership and to the effects

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2. Laughlin, In Support of the Thayer Theory of Presumptions, 52 Mich. L. Rev. 195, 196-207 (1953).

3. See comment to La. R.S. 14:13 (1973) explaining how the common law presumption was restated as a substantive rule that persons less than seven years old are "exempt from criminal responsibility." See also, Bennett, The Louisiana Criminal Code—A Comparison of Prior Louisiana Criminal Law, 5 La. L. Rev. 6 (1942).

4. La. Crim. Code art. 10(1).

5. La. Crim. Code art. 10(2).

6. La. Civ. Code art. 1849 (Supp. 1984); McCormick, *supra* note 1, at 965.

7. See *Les Presomptions et Les Fictions en Droit* (C. Perlman & P. Foriers, eds. 1974). Note for example that the Swiss Civil Code distinguishes between simple presumptions in article 930 (*presume* and *Vermutung*) and conclusive presumptions in article 937 (*presomption du droit* and *Vermutung des Rechts*).

8. P. Herzog, *Civil Procedure in France* 310 (Martinus Nijhoff, The Hague, 1967).

of possession<sup>9</sup> are addressed without using the term presumption. Rather, attention should be focused on precise textual provisions and basic policies.<sup>10</sup>

## I. POSSESSORS CONSIDERED OWNERS

### A. *Third Persons*

Louisiana Civil Code article 3423 is precise in stating: "A possessor is considered provisionally as owner of the thing he possesses until the right of the true owner is established." Without using the term *presumption*, the drafters developed an appropriate statement of a benefit of possession, specifically that a person not claiming ownership of a thing cannot require the possessor to prove his title.<sup>11</sup> *Peloquin v. Calcasieu Parish Police Jury*<sup>12</sup> is a good example of this principle; the defendant, accused of killing plaintiff's cat, could not contest plaintiff's ownership once possession was established. No inference or true presumption was involved; the issue of title simply could not be addressed at all. One could perhaps try to fit the situation into a conclusive presumption analysis, but this analysis would have to include the qualification that the presumption is conclusive only between the parties and only when no claim of ownership is made. In any event, the substantive rule that third persons cannot contest the title of a possessor outside of a lawsuit to establish ownership is best stated as the drafters did, without recourse to presumptions.

From this rule, it also follows that a person accused of trespass should not be able to contest the possessor's title absent a claim of ownership.

The law of trespass, both civil and criminal, is universally recognized to be law relating to the protection of peaceable possession, and it is particularly true that a defendant may not successfully resist prosecution for trespass on the ground that

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9. Throughout this paper, possessor and possession are used in the technical sense of La. Civ. Code arts. 3424 and 3435. More than physical detention is required to constitute possession, and one must possess as owner. Possession that is violent, clandestine, discontinuous, or equivocal has no legal effect. La. Civ. Code art. 3435.

10. This follows the suggestion in Allen, Presumptions, Inferences and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecessary Ambiguities and a Proposal for Reform, 76 Nw. U.L. Rev. 892 (1982).

11. La. Civ. Code art. 3423, as revised by 1982 La. Acts, No. 187, § 1. The "considered provisionally" language comes from art. 3454(1) of the Louisiana Civil Code of 1870 and art. 3417 of the Code of 1825. The equivalent French texts do not use the term "presumption;" the phrase used is "*sont reputes par provision*."

12. 367 So. 2d 1246 (La. App. 3d Cir. 1979).

title to the area trespassed upon resides in some person other than the party actually in possession.<sup>13</sup>

### B. Title Disputes—Immovables

Article 531 governs claims of ownership of immovables. If the claim is against a possessor, the claimant "must prove that he has acquired ownership from a previous owner or by acquisitive prescription."<sup>14</sup> The text solves a problem without recourse to presumption terminology; in simple terms it establishes a burden of persuasion and specifies what must be proved. In light of *Pure Oil v. Skinner*,<sup>15</sup> which article 531 appears to codify, proving acquisition from a previous owner means tracing the title by transfers from a sovereign, or from one who acquired by prescription.<sup>16</sup> In rare instances, this could also be proven by operation of law.<sup>17</sup>

Article 532 is less clear: "When the titles of the parties are traced to a common author, he is presumed to be the previous owner." A strict reading might suggest a true presumption, one by which the common author's ownership can be disproved. If so, once the plaintiff

13. *State v. Almokary*, 212 La. 783, 33 So. 2d 519 (1948). Of course, if the defendant reasonably believes he owns the property, he may have a mistake of fact defense to a criminal prosecution. See La. R.S. 14:16 (1974).

14. La. Civ. Code art. 531, as revised by 1979 La. Acts, No. 180, § 1.

15. 294 So. 2d 797 (La. 1974). See Maraist, *The Work of Louisiana Appellate Courts for the 1974-1975 Term—Civil Procedure*, 36 La. L. Rev. 556, 572 (1976).

16. *Badeaux v. Pitre*, 382 So. 2d 954 (La. 1980). Attempts have been made to use dictum from *Badeaux* to buttress an argument that this burden does not apply when the possessor has no title. That language in *Badeaux* is actually a quote from *Zeringue v. Williams*, 15 La. Ann. 76 (1860), a case decided long before *Pure Oil v. Skinner* and the subsequent adoption of arts. 531 and 532. This dictum was used in a dissenting opinion in *Weaver v. Hailey*, 416 So. 2d 311, 320 (La. App. 3d Cir. 1982), and was adverted to in *Bickham Inc. v. Graves*, 457 So. 2d 1210, 1214 n.4 (La. App. 1st Cir. 1984): "We believe the *Badeaux v. Pitre* rule to be a judicially recognized exception to Articles 531 and 3653."

The room for such an argument is quite small. Art. 531 is a codification of the *Pure Oil* rule, with only one exception provided, that stated in art. 532. It would be a most unusual drafting technique to provide one exception and only one exception to the stated rule (the common author rule) while also conceiving it to be in the power of courts to establish other exceptions to that stated general rule. This argument is essentially an attempt to return to the position of the dissent in *Pure Oil*, a dissent which had the support of only two members of the court.

The majority in *Pure Oil* specifically overruled *Hutton v. Adkins*, 186 So. 908 (La. App. 2d Cir. 1939) which itself relied on *Zeringue*, the same case which *Badeaux* quoted. See Comment, *The Civil Code Articles on the Protection of Ownership*, 55 Tul. L. Rev. 192, 208 n. 1118 (1980).

17. See La. Civ. Code art. 499 (alluvion and dereliction); art. 502 (avulsion); art. 504 (river changing course); La. R.S. 48:701 (1984) (revocation of dedication).

out of possession traces his and the possessor's title to a common author, the possessor could then introduce evidence that the common author does not have either a chain of juridical acts back to a sovereign or acquisitive prescription. Arguably, this would establish that the plaintiff is not the owner, and the possessor's possession would prevail.<sup>18</sup> This approach is problematical at best, for it involves proving negative propositions. More importantly, showing the lack of recorded transfers from a sovereign does not prove lack of ownership. While such transfers may be required to prove ownership, the converse is not necessarily true. One can still have valid transfers that were never recorded, were never required to be recorded,<sup>19</sup> or were recorded but were subsequently lost or destroyed. Indeed, the only way to prove that a person is not owner of a thing that is susceptible of being privately owned is to prove ownership in someone else.<sup>20</sup> Another view is to consider the presumption of article 532 as conclusive, although the reporter's comment to the article indicates the presumption is rebuttable in at least two ways: showing another chain of title or acquisitive prescription in a third person. Perhaps one could say the presumption is conclusive as to the parties inasmuch as they rely on a common title, but not conclusive as to other sources of ownership. In any event, to call it a conclusive presumption sometimes and a rebuttable presumption at other times only fosters confusion.

Article 532 makes better sense in light of its peculiar history. Once the difficult burden of proof of *Pure Oil v. Skinner*<sup>21</sup> was adopted by the supreme court, it was argued that there remained in effect an exception to that rule, an exception that was thought to have existed under the prior jurisprudence. This exception was that a possessor should not force an adverse claimant to satisfy the difficult burden of proving transfers back to the sovereign when the possessor derived his claim from a common author.<sup>22</sup> At issue is more of an estoppel than a presumption.<sup>23</sup> A possessor is not allowed to benefit from the defect in

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18. See Comment, *supra* note 16, at 208, 217.

19. La. Civ. Code art. 1839 and its predecessors normally require transfers of immovables to be in writing, but recordation is not required for the validity of the act.

20. Included would be proof of ownership in the state.

21. 294 So. 2d 797 (La. 1974); see *supra* note 11.

22. Compare *Clayton v. Langston*, 311 So. 2d 74 (La. App. 3d Cir. 1975) with *Tenneco Oil Co. v. Houston*, 364 So. 2d 1056 (La. App. 2d Cir. 1978). See also *Maraist*, *supra* note 15.

23. A similar estoppel supports the position of Justice Lemmon in his concurring opinion in *Kizer v. Lilly*, 471 So. 2d 716 (La. 1985), that when a plaintiff prevails in a possessory action based on possession of a servitude of passage over land possessed by a defendant, the defendant then has the burden "to prove no servitude has ever been established" rather than proving good title to the land as required by art. 530. *Id.* at

another's title when the title under which he possesses has the same defect. Such an equitable notion is questionable, especially since it puts a possessor under color of title in a worse situation than a squatter with no title at all.<sup>24</sup> Apparently, the logical inconsistencies of this approach did not sway the legislature, presumably because the case of true squatters is a rare one, and the more usual situation will involve common authors.

In any event, if one allows the legislative history of the provision to govern, it appears that the common author rule of article 532 is not a presumption at all. It is a rule of substantive law defining the proof that is necessary to establish ownership when a common author exists. In such a case, the plaintiff out of possession need only prove title to the common author (instead of to the sovereign) and then that a valid transfer exists from that author to the plaintiff prior to a transfer to defendant. He would then win the lawsuit unless the possessor can show that plaintiff has lost his ownership (as by the possessor's prescription) or defendant can show that he also benefits from another chain of title from the sovereign that proves his ownership.

This potential confusion would be avoided if the code did not use presumption terminology and instead, simply provided at the end of article 531, "If the title of the parties descends from a common author, the claimant need only prove acquisition from the common author."

### C. *Title Disputes—Movables*

Special rules outside the Louisiana Civil Code govern passage of title of negotiable interests and certain registered movables. The code articles on proof of ownership of movables are utilized when not in conflict with these provisions and are also utilized with respect to other movables not covered by special statutes.

A version of the doctrine, that possession of movables is equivalent to title, was introduced to Louisiana in revised code article 520. Under this article, a good faith transferee for value "acquires the ownership of a corporeal movable" if the transferor had possession with the consent of the owner.<sup>25</sup> In a companion section on proof of ownership, article 530 provides that the possessor of a corporeal movable "is presumed

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722. Since the plaintiff would be arguing he has a right carved out of the defendant's ownership rights or those of the defendant's ancestors in title, either by transfer or by prescription, he should be estopped from making the defendant prove his ownership of the land involved. The burden on the landowner would then be the lesser one of proving that no transfer and no prescription exists.

24. See Yiannopoulos, *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Property*, 36 La. L. Rev. 346, 360 (1976); Maraist, *supra* note 15, at 572.

25. La. Civ. Code art. 520, as revised by 1979 La. Acts, No. 180, § 1.

to be its owner . . . [and that] . . . [t]he previous possessor of a corporeal movable is presumed to have been its owner during the period of his possession." But those presumptions "do not avail against a previous possessor who was dispossessed as a result of loss or theft."<sup>26</sup> Language in the comment to article 530 suggests that this presumption in favor of the present possessor is "generally rebutted where the claimant proves that the possession of his adversary is precarious, equivocal, clandestine, or the result of fraud."<sup>27</sup>

This scheme was complicated by the subsequent repeal of article 520,<sup>28</sup> which presumably returned the state's substantive law to what existed before the revision. Therefore, a possessor cannot transfer title, and the protection of good faith purchasers hinges on the doctrines of estoppel, apparent agency, or acquisitive prescription.<sup>29</sup> However, as article 530 was not repealed, its "presumptions" remain in effect.

### 1. *Title Disputes—Lost or Stolen Items*

The presumptions of article 530 "do not avail against a previous possessor who was dispossessed as a result of loss or theft."<sup>30</sup> In other words, no presumption exists in favor of the possessor if the item was stolen from or lost by a previous possessor, if the latter claims ownership.

If a previous possessor claims ownership, proves he had possession, and proves he lost it because of loss or theft, the current possessor gets no benefit of a presumption of ownership. But, in that case, the previous possessor has not lost his presumption of prior ownership and probably can prevail if the current possessor cannot then otherwise prove his ownership. The burden will be on the previous possessor to prove possession of the thing<sup>31</sup> and loss or theft. The burden then shifts to the current possessor who must prove his ownership. He will probably not be able to do so by occupancy because there was no prior aban-

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26. La. Civ. Code art. 530, as revised by 1979 La. Acts, No. 180, § 1.

27. *Id.*, comment.

28. 1981 La. Acts, No. 125, § 1; La. S. Con. Res. No. 172, 6th Reg. Sess. (1980).

29. Comment, *Sales of Another's Movables—History, Comparative Law, and Bona Fide Purchasers*, 29 La. L. Rev. 329 (1969).

30. La. Civ. Code art. 530 para. 2, as revised by 1979 La. Acts, No. 180, § 1.

31. This includes proving that the thing detained by the current holder is the same thing that was lost or stolen. In the normal case, identification of a car or bicycle can be accomplished through serial numbers and other types of proof. Special problems arise with "chop shops" selling off stolen automobiles by the piece; identification is virtually impossible. The same problem can arise with respect to many movables such as televisions, stereos, and the like. In those instances, it would be the previous possessor's burden to prove that the thing identified is that which was stolen or lost. In some instances, the rules governing accession to movables (La. Civ. Code arts. 507-516) could come into play, especially when the thing involved is constructed of parts belonging to different owners.



donment.<sup>32</sup> Acquisition by three or ten years prescription is a possibility.<sup>33</sup> Acquisition of ownership by virtue of the rules of apparent agency and estoppel is also possible, as well as acquisition by virtue of the special statutes regulating the sale of lost or stolen things.<sup>34</sup> Derivative titles from one who could prove acquisition by one of the above methods would also be possible, though of course, it would be virtually impossible to prove transfers from a sovereign.

If the current possessor cannot prove title by these means, the question arises as to whether he could somehow rebut the presumption in favor of the previous possessor by showing that the latter cannot establish title. The current possessor would have to prove the previous possessor did not acquire from a former owner or an absence of occupancy, acquisitive prescription, apparent agency, or estoppel. Practically, however, the presumption that the previous possessor is the owner is not rebuttable by such means, as an attempt to prove such negative propositions would generally be futile. Thus, it seems that the current possessor can only overcome this presumption by proving his own title.

Consider the not uncommon situation, especially in dealing with art objects, of a movable item that has been subject to two thefts—a thing that was possessed by A, stolen by a person unknown, possessed by B, stolen again by a person unknown, and then possessed by C. As between C and B, B should prevail in a title dispute as just discussed. By the terms of article 530, B loses his presumption only in a title contest with a possessor previous to him who lost possession by loss or theft; he does not lose it as to C. In a contest between A and B, A should prevail as the previous possessor who has not lost the presumption. As between A and C, A should still prevail since he is still a previous possessor.

The alternative would be, in a contest between B and C, to give neither party a presumption of ownership and adopt some notion of letting the "better title" prevail, as in dealing with immovables when neither is in possession. But such an approach is difficult without a title registration system such as that employed for immovables. Because it is difficult to prove title to movables, possession becomes more important, and necessary, as a means of settling such disputes. It is, in

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32. La. Civ. Code art. 3418.

33. La. Civ. Code arts. 3490 and 3491.

34. See Comment, *supra* note 29; La. R.S. 9:151-182 (Supp. 1985) (Uniform Disposition of Unclaimed Property Act); La. R.S. 9:191-192 (Supp. 1985) (Disposition of Unclaimed Specimens by Taxidermists); La. R.S. 4:176 (Supp. 1985) (unclaimed winnings on pari-mutual wagering); La. Civ. Code art. 3236 (unclaimed property left in a hotel, motel, inn, etc.); La. R.S. 9:4681-4689 (1983) (Rugs, carpets, clothing, and household goods); La. R.S. 9:4701-4703 (1983) (jewelry, gems, and watches); La. Civ. Code art. 3418 (abandoned things); La. Civ. Code art. 3420 (treasure); but see La. Civ. Code art. 3419 (corporeal movables that have been lost).

effect, the better title. For that reason, the presumption here should work to let the previous possessor prevail unless the later possessor rebuts it by coming forward and proving ownership.

## 2. *Title Disputes—Other Items*

The current possessor is presumed to be the owner. One who never possessed but who claims ownership has the burden of proving title. If he was never a possessor, he cannot use occupancy or acquisitive prescription to prove title, and appears limited to proving ownership by derivative transfer from an owner. Thus, practically, a person who never had possession or derived rights from a possessor cannot prevail against the current possessor.

It would not solve the dispute between these parties to allow a non-possessor to rebut the possessor's presumption of ownership in a way other than proving his own title, because the non-possessor would also be unable to prove ownership.

If both claimants were possessors at one time, both the previous possessor and the current possessor benefit from the presumption of ownership—the previous possessor during the time of his possession and the current possessor now. If no loss or theft occurred, there must exist some state of facts that explain how the movable was transferred from the previous possessor to the current possessor. One approach would be to investigate the transaction or the actions by which the transfer occurred: loan, lease, deposit, pledge, etc. With those facts, inquiry can be made to the special rules applicable for the transfer of ownership of certain movables (title certificates, etc.) or to estoppel or apparent agency. In this inquiry, the conflicting presumptions of article 530 would have little place and provide little assistance. Thus, the parties would be left in the normal evidentiary situation which occurs when there is no presumption.

Another, more literal approach, would be to read article 530 to mean that the present possessor is presumed to be owner now, and that this presumption is of greater weight than having been presumed to be a previous owner. Arguably, the burden would then be on the former possessor to come forth with proof of the facts that would explain how he did not lose his ownership through various acts.

Thus, the presumption of article 530 is not an important one, primarily because of the lack of a sovereign from whom to trace title to prove ownership and the availability of the sales law to establish title through apparent agency or estoppel.

## II. STRUCTURES AND PLANTS AS COMPONENTS OF THE SOIL

Louisiana Civil Code article 491 states:

Buildings, other constructions permanently attached to the ground, standing timber, and unharvested crops, or ungathered fruits

. . . are presumed to belong to the owner of the ground, unless separate ownership is evidenced by an instrument filed for registry in the conveyance records of the parish in which the immovable is located.

Literally, this text means that a presumption does not exist if an instrument providing for separate ownership is recorded. In such a case, it would follow that the question of whether a landowner owns the constructions should be approached without benefit of presumptions. A plaintiff wanting to prove ownership of a building or crop on another's land should be able to do so by normal means of proof. Possession of the immovable or movable would play its normal role. The recorded document would not be proof of its contents, as in the usual public records practice,<sup>35</sup> but it would be the basis to avoid the presumptions of article 491.

In the absence of such a recorded notice, article 491 does seem to establish a presumption. If this is a true presumption, it would follow that it can be rebutted by showing that another person owns the structure or the crop. However, such an interpretation would seem to be inconsistent with the public records doctrine as there would be little difference between situations in which documents were recorded or unrecorded. Another inconsistency is suggested by comment (c) which provides that separate ownership may be asserted "only if it is evidenced by an instrument filed for registry," referring to a conclusive presumption.

Resolution of these inconsistencies may begin by questioning the validity of the comments that apparently contradict a clear article. However, the comments receive support from other provisions establishing a strong public records doctrine in Louisiana. In the final analysis, the possible presumption in article 491 is of little importance. The governing law is the substantive rule that, as to third persons, constructions and crops go with the land unless separate ownership is indicated in the public records. Louisiana Civil Code article 1839 states that an "instrument involving immovable property shall have effect against third persons only from the time it is filed for registry . . ." This is a rule of substantive law, not a presumption, which allows a third person to treat a structure as a part of the land when no instrument providing otherwise is recorded. Similarly, Louisiana Revised Statutes 9:2721 provides in greater detail that the kinds of agreements that result in separate ownership of buildings, structures, crops, or trees (sale, contract, counter letter, lien, mortgage, judgment, surface lease, gas or mineral lease, or other instrument of writing relating to or affecting immovable property) shall not "be binding on or affect third persons or third parties unless

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35. Redman, *The Louisiana Law of Recordation: Some Principles and Some Problems*, 39 Tul. L. Rev. 491, 495 (1965).

and until filed for registry . . . and neither secret claims or equities nor other matters outside the public records shall be binding upon or affect such third persons.”

A problem arises with oral agreements, especially oral leases. While the text of 9:2721 is susceptible of the construction that oral leases need not be recorded to affect third persons (after all, there is no document to record), the case law appears to construe the statute to mean that any juridical acts, whether written or oral, must be recorded to affect third persons.<sup>36</sup> While this is a problematical construction open to dispute, it is at least consistent with widely held views that place prime importance on recorded documents.

These authorities, however, do not solve the problem of the possessor who builds structures on land belonging to another. Here, there may be no juridical acts at all, much less written ones, to record. If the possessor bought from a non-owner, the sale may be recorded, but it will not be indexed under the name of the real owner of the property and will not be discovered in the usual title search. If one were to take articles 496 and 497 literally, their establishment of the rights of good faith and bad faith possessors with respect to structures built on the land of another apply to a revindicating landowner without regard to whether that person was the owner of the land at the time of construction. However, article 498 seems to establish a different rule. If the possessor built the structure on land belonging to another and then lost his ownership because that landowner transferred his interest to another, the possessor “who lost the ownership of a thing to the owner of an immovable may assert against third persons his rights under Articles 493, 493.1, 494, 495, 496, or 497 when they are evidenced by an instrument filed for registry in the appropriate conveyance or mortgage records . . . .” The substantive rule here seems clear; without registry, the possessor cannot pursue his remedies against subsequent purchasers from the person who was owner when he built the structure. This analysis seems to contradict the concept that possession is a real right that can be asserted against the world, yet the ultimate effect of article 498 is that unrecorded claims by a possessor cannot prevail.

This effect is further reason to argue that article 491 means little. The operative provisions here are Louisiana Civil Code articles 498 and 1839 and Revised Statutes 9:2721-24. They establish the substantive rule that unrecorded contracts or juridical acts or rights of possession do not affect third persons.

This analysis does not explain, however, the situation that arises when other interests in land exist; for example, the interest in land that

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36. *Blevins v. Manufacturers Record Publishing Co.*, 235 La. 708, 105 So. 2d 392 (1958).

arises from operation of law. No law requires recordation to establish the validity of such interests, even as to third persons. Thus, an article 890 usufruct exists and binds property without any instrument being recorded. The usufruct is valid and cannot be contested by a third person. Yet, if article 498 is taken literally, it may be applicable to a building constructed by the usufructuary, requiring a separate recordation to protect the usufructuary's ownership as against third persons.

### III. POSSESSION AS OWNER

Article 3427 provides: "One is presumed to intend to possess as owner unless he began to possess in the name of and for another." By its terms, this article would appear to create a true evidentiary presumption that puts the burden of coming forward with the evidence and the burden of persuasion on the person alleging the opposite. The initial question would be whether possession began precariously; if so, no presumption arises—if not, the presumption exists. But the article is circular; the presumption exists unless the possessor began to possess in the name of and for another. Yet, possession for another is the same thing that should be proved to disprove possessing as owner. It would be more precise to say that one is presumed to intend to possess as owner. The presumption is overcome by showing that one began to possess in the name of and for another.

It may seem odd for this article to focus on the beginning of the time period, but this is of no great consequence. If one commenced possession as owner and then later learned of the true owner's rights and acknowledged them, the possession would become precarious.<sup>37</sup> Here, in the absence of presumptions, the person claiming an acknowledgement would have the burden of proving it.

After a possessor leaves property, the "intent to retain possession is presumed unless there is clear proof of a contrary intention."<sup>38</sup> Again, the language is less than precise. If the presumption exists, it exists and is overcome by proof of a contrary intention. It is not helpful to state that the presumption exists unless it is rebutted. To require "clear proof" is, in other words, to state that a presumption exists.

Louisiana Civil Code article 3438, in the section on precarious possession, refers to another presumption: "A precarious possessor, such as a lessee or a depositary, is presumed to possess for another although he may intend to possess for himself." The comment to this article suggests that the rule becomes relevant when the possessor changes his mind and intends to possess for himself. Perhaps this means that one

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37. La. Civ. Code arts. 3464 and 3437.

38. La. Civ. Code art. 3432.

retains precarious possessor status until the requirements of article 3439 are met: that the possessor either give actual notice or show acts sufficient to give notice of the change of intent. In other words, an objective standard is established to change the character of a precarious possessor's possession; a subjective change of intent is not enough. As such, article 3438 is redundant. No presumptions are involved; it is a rule of substantive law. However, the comment to article 3438 states that the article's presumption is rebuttable. If this is the case, the presumption is rebutted by meeting the requirements of 3439.

In any event, the core rule here is that the person alleging the precariousness of another's possession has the burden of proving that fact. Proof that the possessor possessed for another discharges that burden. Once a precarious possession is established, the burden shifts to the precarious possessor who must then prove that he meets the requirements of article 3439.

#### IV. PRESUMPTION OF GOOD FAITH

Code article 3481 seems to be a true evidentiary presumption: "Good faith is presumed," and the presumption "is rebutted on proof that the possessor knows or should know that he is not the owner of the thing he possesses." This latter statement mirrors the definition of article 3480, that a good faith possessor is one who "reasonably believes in light of objective considerations, that he is the owner of the thing he possesses."

It follows that the burden of persuasion is on the person alleging bad faith. Comment (b) to article 3481 states, "one who alleges that the possession is not in good faith has the burden of proving his allegation." If the issue is not raised, the presumption should be a sufficient basis to conclude that the possessor is in good faith.

The significance of this placement of the burden of persuasion with respect to promoting stability of titles has been magnified since *Bartlett v. Calhoun*.<sup>39</sup> That case prevented bad faith possessors from taking advantage of the good faith of prior possessors. The result has been that it is now often necessary to establish the good faith of several successive possessors in a chain of title. Since these problems will often arise in cases dealing with old transactions and old acts of possession that are hard to establish, stability of titles will benefit from placing the burden of persuasion on the person trying to avoid the important societal policies attached to acquisitive prescription.

To be a possessor in good faith, the possessor must subjectively believe that he is the owner. In addition, the belief must be a reasonable

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39. 412 So. 2d 597 (La. 1982).

one. This first inquiry is readily handled by the normal process of applying the presumption of good faith, and the burden is on the non-possessor to prove that the possessor did not in fact believe he was the owner of the thing. The difficulty of proving this negative proposition results in this inquiry normally being avoided by the non-possessor. In such a case, the second inquiry then centers on whether the belief was reasonable. In dealing with this question, the presumption of article 3481 is less important. In this objective inquiry the finder of fact is more likely to make a decision as to reasonableness on the basis of societal perceptions about how people should act and in light of basic policy concerns. When the factfinder's mind is truly in equipoise on the question, the conclusion should be that the non-possessor has not met his burden. In such a case, the presumption in favor of the possessor does play a role. Of course, the cases in which there is true equipoise are rare, so that the presumption in article 3481 plays a small role in these issues of mixed law and fact.

Examination of the jurisprudence on this issue of the reasonableness of a good faith belief does not result in any simple generalizations. Cases focusing on factual grounds are hard to assess as precedent, as each situation will necessarily depend on its particular facts.<sup>40</sup> To the extent that statements, usually dicta, of rules were mentioned in the early jurisprudence, the rules were not resolving the issue to adequately reflect current real estate practice and the important policies served by using good faith prescription. Several legislative changes were required to establish, and should be the policy impetus for the courts to continue, the trend toward finding that good faith beliefs are reasonable. This would be altogether consistent with the policy reflected in the presumption of good faith. Indeed, such a presumption in favor of reasonableness would seem to be required, for article 3481 presumes "good faith," as defined in article 3480 as including both a subjective question and a reasonableness question.

For example, language in some opinions indicates that *doubt* is enough to preclude good faith,<sup>41</sup> often relying upon quotations from French commentators.<sup>42</sup> But if doubt is really the equivalent of equipoise between a belief of ownership and a lack of such belief, this would seem to be the very situation in which one ought to benefit from the presumption. Indeed, with the uncertainty of records and the loss of

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40. Comment, The Ten-Year Acquisitive Prescription of Immovables, 36 La. L. Rev. 1000, 1002 (1976); Note, Ten Year Acquisitive Prescription: Good Faith and Interruption, 39 La. L. Rev. 1021, 1023 (1979) [hereinafter cited as Note, *Good Faith and Interruption*].

41. See, e.g., *Knight v. Berwick Lumber Co.*, 130 La. 233, 57 So. 900 (1912).

42. 1 M. Planiol, *Civil Law Treatise* pt. II § 2667, at 581 (12th ed. La. St. L. Inst. trans. 1959); 2 C. Aubry & C. Rau, *Droit Civil Francais* § 218, at 364 (P. Esmein 7th ed. 1961) in 2 *Civil Law Translations* 359, 364 (J. Mayda trans. 1966).

records, it is often difficult to establish perfect ownership without doubt; even the best title examiner knows of possible problems in a title. But the problems are often not serious ones and nevertheless worth taking the risk. There may be doubt in these cases, but not enough to constitute bad faith.

Another dubious line of cases adopted the view that a possessor could not be in good faith even though he subjectively believed he owned the land, if his belief resulted from an "error of law." There were even some suggestions that mistakes by one's lawyer constituted such an error.<sup>43</sup> The basis for that approach has been repealed, however, and it is now clear that an error of law is not the basis for otherwise rendering one in "legal" bad faith.<sup>44</sup> Associated with this rule were notions that errors of lawyers were imputed to clients, but these statements stem from cases in which high officials of corporations knew of possible title defects, so that it was plausible to argue that the corporation was not in good faith.<sup>45</sup>

In any event, this change in the law has eliminated these dubious concepts, leaving only two basic questions that arise under the current definition. The first issue is simply whether the possessor subjectively believes he owns the things involved. The second issue is simply whether this belief, in light of all the circumstances and in light of how people conduct themselves, is a reasonable belief. If this belief is reasonable, the inquiry should end here. It should not matter that the belief resulted from an error of law or an error of fact. If, for example, the error relates to whether a woman was married or not, probably an error of fact, or whether the error relates to lack of knowledge about the power of married women to transfer title to community property, probably an

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43. See *Martin v. Schwing Lumber & Shingle Co.*, 228 La. 175, 81 So. 2d 852 (La. 1955); Note, *Good Faith for Purposes of Acquisitive Prescription in Louisiana and France*, 28 La. L. Rev. 662 (1968); Note, *Good Faith and Interruption*, supra note 40; cf. *Phillips v. Parker*, 469 So. 2d 1102 (La. App. 2d Cir. 1985) where the court appears to accept the change in the law with regard to legal bad faith. However, the court does not go far enough when it concludes there still exists the view that "the presumption of good faith may be rebutted when a purchaser voluntarily undertakes to search the public records and is thus charged with the knowledge that a reasonable person would acquire from the public records." *Id.* at 1107. It would seem there is no basis in the statutes for this conclusion other than the now-repealed error of law doctrine. There is nothing in the statutes to "charge" one with all information a reasonable person would acquire from the public records. It is also difficult to understand the court's statement in footnote 3 that evidence showing the defendants may not have directly hired or paid the title examiner "is irrelevant."

44. 1982 La. Acts, No. 187, § 2 repealed Civil Code art. 1846(3). See La. Civ. Code art. 3481, especially comment c.

45. See Note, *Working With the New Civil Code Property Scheme*, The 1982 Book III Revision, 43 La. L. Rev. 1079 (1983); Symeonides, *One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription*, 44 La. L. Rev. 69, 111-12 (1983).



error of law, the inquiry should be whether this mistake is reasonable or not.<sup>46</sup>

If the belief by the possessor results from a title opinion from an attorney of good reputation, the issue should be whether a reasonable person would act on such an opinion, regardless of whether the attorney made an error of fact or an error of law in reaching his opinion. Current practice would seem to indicate that having a good title opinion would be the ultimate in reasonableness.<sup>47</sup>

Also problematical is a case like *Board of Commissioners v. S.D. Hunter Foundation*,<sup>48</sup> where the possessor acquired part of a tract by quitclaim and part by a sale with warranty. The court found that the possessor's belief based upon the quitclaim was not reasonable. The fact of such use of a quitclaim should not be dispositive, as has been well argued elsewhere.<sup>49</sup> The same is true with *Board of Commissioners v. Elmer*,<sup>50</sup> a case in which the court of appeals ultimately found no reasonable good faith by a 3-2 vote after the trial judge had found good faith on original hearing and on remand. If the question was that close, it is hard to see how the allocation of the burden of proof was being given its effect. The courts should reverse the approach reflected by these cases and follow the trend in favor of stability of title through 10-year acquisitive prescription.

#### CONCLUSION

The use of the term presumption in the Louisiana Civil Code to describe several different burdens of proof causes confusion and complexity in the law of property. The Civil Code revision could have clarified this area of the law by removing presumptions which are unclear or which are actually substantive rules. But since such a revision did not occur, practitioners must deal with these unclear presumptions by focusing upon the precise textual provisions and the basic policies underlying these presumption articles.

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46. See Note, Prescription—Ten Year Acquisitive Prescription Founded on Wife's Conveyance of Community Immovables, 25 La. L. Rev. 973 (1965).

47. See Symeonides, *supra* note 45.

48. 354 So. 2d 156 (La. 1978); critiqued in Note, *Good Faith and Interruption*, *supra* note 40.

49. Note, *Good Faith and Interruption*, *supra* note 40.

50. 268 So.2d 274 (La. App. 4th Cir. 1972).